VARUSAY MOHAMED SHAIK ABDUL RAHMAN *a*

v.

SVK PATCHEE BROTHERS (MALAYSIA) SDN BHD

COURT OF APPEAL, KUALA LUMPUR *b*
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: P-02-314-2000]
5 JULY 2002 *c*

COMPANY LAW: *Winding up - Petition - Companies Act 1965, s. 218(1)(i) - Company a family-run business - Breakdown in relationship between parties - Just and equitable rule - Whether absence of mutual trust and confidence justified winding-up of company*

This was an appeal by the appellant against the decision of the High Court in dismissing his petition to wind up the respondent company. The appellant raised issues of irregularities and mismanagement in justifying his application. *d*

Held:
Per Mohd Noor Ahmad JCA *e*

[1] Where the pre-existing partnership had been converted into a limited company and run as a family business, the company was formed and continued on the basis of a personal relationship involving mutual confidence. Thus, as evidence proved that the relationship between the appellant and the respondent had broken down, it also indicated that there no mutual trust and confidence between the said parties. This justified winding-up the company on the just and equitable ground. (p 748 f-g) *f*

[2] Appellate interference was justified in the present circumstances. The trial judge had misdirected himself in exercising his discretion by considering the fact that the company was on-going concern and capable of making profits. There was also the matter regarding employees suffering undue hardship in the event a company is wound up. Past cases have stated that such issues fell outside the ambit of the expression 'just and equitable.' (p 749 b) *g* *h*

[2a] The trial judge failed to note that there had been no break in the business of the respondent. Although there were subsequent partnership agreements and dissolution of the partnership, essentially the business was continued, otherwise it would have ended upon the death of Manium if not for the will. Also, no regard was given to the fact that although *i*

the appellant had acquiesced to the company's decisions in relation to his complaints, such acquiescence could not override the fact that there was a breakdown of mutual confidence and good faith among the parties. (pp 749 e, g & 750 b)

[3] The company was ordered to be wound up and the appellant to nominate a liquidator. The proceeds of the sale of the company assets were to be divided amongst the parties in accordance with their respective shareholdings. (p 750 f-g)

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini merupakan rayuan oleh perayu terhadap keputusan Mahkamah Tinggi dalam menolak petisyen beliau untuk menggulung syarikat responden. Perayu telah membangkitkan isu-isu mengenai luar aturan dan salah urusan dalam mewajarkan permohonan beliau.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Di mana perkongsian yang pra-wujud telah ditukar menjadi sebuah syarikat berhad dan dikendalikan sebagai sebuah perniagaan keluarga, syarikat tersebut telah dibentuk dan diteruskan atas dasar perhubungan peribadi yang melibatkan keyakinan bersama. Oleh itu, sepertimana yang terbukti oleh keterangan bahawa perhubungan antara perayu dan responden telah terputus, ianya juga menunjukkan bahawa tidak terdapat amanah dan keyakinan bersama antara pihak-pihak tersebut. Ini mewajarkan penggulungan syarikat tersebut atas alasan yang adil dan saksama.

[2] Campur tangan rayuan telah diwajarkan dalam keadaan semasa. Hakim perbicaraan telah tersalah arah akan dirinya dalam melaksanakan budibicaranya dengan menimbangkan fakta bahawa syarikat tersebut merupakan sebuah syarikat yang berfungsi dan berkeupayaan untuk membuat keuntungan. Terdapat juga perkara berhubung dengan pekerja-pekerja yang akan mengalami kesukaran yang tidak sepatutnya sekiranya syarikat tersebut digulung. Kes-kes yang dahulu telah menyatakan bahawa isu-isu yang sedemikian berada di luar lingkungan ungkapan 'just and equitable.'

[2a] Hakim perbicaraan gagal untuk memerhatikan bahawa perniagaan responden tidak terputus. Meskipun terdapatnya perjanjian-perjanjian perkongsian dan pembubaran perkongsian tersebut, secara pentingnya perniagaan tersebut telah diteruskan, jika sebaliknya ianya telah dibubarkan dengan kematian Manium jika bukan kerana wasiatnya. Juga, tiada pertimbangkan telah diberikan kepada fakta bahawa meskipun perayu telah bersetuju dengan keputusan syarikat tersebut berhubung dengan aduan-aduan beliau, persetujuan yang sedemikian tidak boleh melebihi fakta bahawa berlakunya perpecahan keyakinan amanah bersama dan niat baik dikalangan pihak-pihak tersebut.

[3] Syarikat tersebut telah diperintahkan supaya digulung dan perayu hendaklah menamaklan seorang penyelesai. Hasil jualan aset-aset syarikat tersebut hendaklah dibahagikan di kalangan pihak-pihak tersebut berhubung dengan pemegangan saham mereka masing-masingnya

[Rayuan dibenarkan dengan kos.]

Case(s) referred to:
Evans v. Bartlaam [1937] AC 473 ***(refd)***
In re Westbourne Galleries [1973] AC 360 ***(refd)***
In re Yenidje Tobacco Co Ltd [1916] Ch D 426 ***(refd)***
New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading) [1992] 1 MLJ 185 ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 ***(refd)***
Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] 1 MLJ 769 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(i)

Companies Act 1948 [UK], s. 222(f)

For the appellant - Kiley Tan Ban Teong (Harminder Kaur Gill); M/s Shearn Delamore & Co
For the respondent - Surinder Singh; M/s Ong & Manecksha

[Appeal from High Court, Pulau Pinang; Companies Winding Up No: 28-41-1999]

Reported by M Maheswaran

JUDGMENT

Mohd Noor Ahmad JCA:
This is an appeal against the decision of the learned judge at Pulau Pinang which dismissed the appellant's petition. In the petition the appellant prayed for the respondent (the company) to be wound up, for the appointment of a liquidator for the purpose and for the proceeds of sale of the company's assets to be paid out to its shareholders as intended under a will or alternatively in

such proportions corresponding to the shareholdings as may be determined by the court. The petition was pitched on s. 218(1)(i) of the Companies Act 1965 ('the Act'), that is to say, if the court is of the opinion that it is just and equitable that the company be wound up. Briefly, the alleged grievances are:

(i) the share equity in the company had been altered to the prejudice of the appellant;

(ii) there was serious mismanagement of the company in its administrative and financial affairs;

(iii) a rival business was set up by the managing director of the company and his family members; and

(iv) the appellant was kept out from participating in the management of the company after he was removed as its permanent director and was forced out as its director by reason of compulsory retirement at the age of 60.

The facts of the case are clearly set out in the learned judge's judgment. For ease of reference, they are produced hereunder:

> S.V.K. Patchee Brothers (Malaysia) Sdn. Bhd. was incorporated on 3.7.1967 under the Companies Act, 1965 as a private company limited by shares and its registered office is at No. 15 Lebuh Bishop, 10200 Penang. It has an authorised share capital of RM1.5 million made up of 1,500,000 shares of RM1.00 each. The shareholders are the descendants of Vershay Mohamed Manium who first registered the said company in 1837 as a business entity under the name of S.V.K. Patchee Brothers (Manium). Vershay as far as it could be ascertained from the record of proceeding had a son named Shayana Vana Shayana Manium. The said Shayana, by a Will dated 27.4.1932 bequeathed the said business to his sons, namely Sayana Abdul Rahman (the petitioner's father) and Sayana Mohamed Ismail. The Will reads in parts:
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> > I bequeath all my business of Dubash and Stevedor which now carry on at No. 15 Bishop Street, Penang under the name of S.V.K. Patchee (Manium) Brothers together with the goodwill thereof all goods and stock-in-trade and the sum of Dollars One thousand ($1000/=) deposited by me with Pstayakerr and Company in connection with or used for the purpose of the said business into my Trustees Upon Trust to carry on the business for a period of 21 years after my death unless special circumstances arise which in their opinion make it expedient to sell the same in which case I declare that the proceeds of such sale shall be divided equally between my said sons Sayana Abdul Rahman and Sayana Mohamed Ismail.

I declare that only one of my said sons shall take charge of my said business during a period of one year while the other said son shall take charge the following year in rotation. I further declare that the profits derived from the said business shall be divided equally between my two sons Sayana Abdul Rahman and Sayana Mohamed Ismail subject to the allowances for the maintenance of my two wives as follows:

(1) ...

(2) ...

(3) ...

All the rest and residue of my estate of whatever nature and wherever situate I give and bequeath to my two sons Sayana Abdul Rahman and Sayana Mohamed Ismail to be divided between them equally subject to the payment of my debt, funeral and testamentary expenses.

Currently the registered shareholders of the company as at 14 November 1997 are the petitioner and his two brothers and Shaik Allaudin and his brothers, sisters and his siblings. It is provided by art. 75 of Memorandum and Article of Association of the company that Messrs. Haji S. Mohamed Ismail, JP, SMI, Shaik Allaudin and SA Varusay Mohamed, (the petitioner) shall be permanent directors of the company. The Managing Director of the company is Shaik Allaudin and the other directors are his son Shaik Aqmal and his brother Shaik Sulaiman.

The patriarch and founder of the company died in India in 1938 while his son Sayana Abdul Rahman died in India on 28 May 1947 and the other son Sayana Mohamed Ismail died in Penang in 1969. This dispute is among and between the grandsons of the patriarch.

After the death of Shayana Vana Shayana Manium, S.V.K. Patchee Brothers (Manium) was entrusted under the Will to the two brothers – Sayana Abdul Rahman and Sayana Mohamed Ismail who carried out the business under the terms of the said Will until its incorporation on 3 July 1967. It was essentially a partnership business between the two brothers. When the company was incorporated on 3 July 1967 the shareholders were:

Sayana Mohamed Ismail	–	10 shares
Shaik Ibrahim	–	5 shares
Varusay Abdul Rahman	–	6 shares
and his two brothers	–	4 shares (2 shares each)

The directors were:

Sayana Mohamed Ismail, Shaik Ibrahim, Shaik Allaudin and Varusay Abdul Rahman.

The company was involved in the business of stevedoring, shiphandling and mutton trading and later on it diversified in the trading of cement and granite.

The facts have been reviewed by us and we are in agreement.

The learned judge made the following findings on the alleged grievances:

> On grievance (i), the shares of Sayana Abdul Rahman and Sayana Mohamed Ismail in the company was not at all times in equal shares, simply because each of the two sons did not take charge of the company each year by rotation as stipulated in the will nor was the company sold. The company was managed by Sayana Mohamed Ismail from the time when Sayana Abdul Rahman returned to India. Therefore, it was not improper for Sayana Mohamed Ismail to allot 10 shares to himself, six shares to his son Shaik Ibrahim and 10 shares to the three sons of Sayana Abdul Rahman. The ratio reflected the share distribution of the partnership in 1958 namely, 6% shares out of 10 shares went to Sayana Mohamed Ismail and his two children. However, based on the existing share equity in the company as on 18 March 1998 (per exh. B at 74-80 in Rekod Rayuan) the learned judge ruled that the shares of the appellant and his brothers had been reduced to a disproportionate ratio with careless disregard to the spirit and intention of the Will and that the appellant's and his brothers' shares should not be less than 35% of the shares of the company.
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> On grievance (ii), having scrutinised the various exhibits tendered the learned judge was satisfied and ruled that there was mismanagement of the administrative and financial affairs of the company.
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> On grievance (iii), the learned judge did not make any finding or ruling on this.
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> On grievance (iv), the learned judge concluded that the removal of the appellant from being the permanent director of the company was to remove an obstacle and was not *bona fide* as it was done under the guise of the compulsory retirement age of 60 which resulted in the appellant's right to participate in the affairs of the company taken away and denied and ruled that such removal was not *bona fide*, improper and inequitable.

We realise and fully appreciate that the learned judge made his decision based purely on his findings of fact. Therefore, it is our duty to scrutinise the decision with great care and caution. For it is only in rare cases that an appellate court should interfere with the primary findings of fact made by the trial court, that is to say, where the decisions are plainly wrong or unjust. Having so scrutinised we decline to interfere with the learned judge's findings

and conclusions on those grievances. However, as there was a non-direction on grievance (iii), we take upon ourselves the task of considering whether or not on the evidence before us, the allegation has been established. We are not in any less disadvantageous position as the learned judge to decide on this issue. The allegation on the rival business is contained in para. 23 of the petition and the denial which is a bare denial is contained in para. 11 of the affidavit-in-opposition. Nothing much rests on credibility as the learned judge did not make any note in the notes of proceeding to enable credibility to be assessed. In fact, when questioned by the court SD2, the managing director of the company admitted that he was a director of the rival business (Kasifa Holding Sdn. Bhd.) which traded in granite which is similar item as traded by the company and shared the same business address as the company (see Rekod Rayuan at 162D). On these facts, we are satisfied that the allegation has been proved.

The learned judge despite having so found on the allegations exercised his discretion not to grant the winding-up order on the sole ground that since the company is 'a going concern' and is capable of making profits, a winding-up order would cause undue hardship to its workers. It is settled law that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he exercised his discretion under a mistake of law (see *Evans v. Bartlam* [1937] AC 473) or where discretion is given to a judge the appellate court ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground (see *New Zealand Insurance Co. Ltd. v. Ong Choon Lin (t/a Syarikat Federal Motor Trading*) [1992] 1 MLJ 185 at 200E).

The principles enunciated in *In re Westbourne Galleries* [1973] AC 360 at p. 379 apply in Malaysia to a petition under s. 213 of the Act for a winding-up on just and equitable grounds (see the Privy Council case of *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ 433 at p. 434 H right column). Our s. 218(1)(i) is in *pari materia* with the provisions of s. 222(f) of the English Companies Act 1948. In that case on 'just and equitable' Lord Wilberforce said:

> My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and

a by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the b exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is c a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a d personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the e company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.

f On the facts of this case especially where the pre-existing partnership had been converted into a limited company and run as a family business it is our considered view that the company was formed and continued on the basis of a personal relationship involving mutual confidence. By reason of the allegations as proved either taken as a whole or in part, in particular grievances g (i), (iii) and (iv), it is manifestly clear that the parties no longer enjoyed the confidence of each other. This fact provided convincing evidence of the breakdown of mutual confidence and good faith among the parties to justify the winding-up on the just and equitable ground. We are fortified in our view by what was deposed by SD2 who is the head of the other faction when h questioned by the court. He said:

Varusay **(the appellant)** is our cousin brother, his relationship is not good with me and my whole family. We are not on speaking terms since 1992. It's a family problem, we can't work together." (see Rekod Rayuan at 162A). (emphasis added)

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That statement sealed the fate of the company.

We are of the view that since the learned judge did not at all direct his mind to the settled principles and the relevant facts of the case, in particular the statement of SD2, it tantamounts to a non-direction. And further, the learned judge in exercising his discretion had manifestly proceeded on a wrong ground, because on decided authorities the fact that the company is an on-going concern and is capable of making profits has never been considered as a factor that falls within the ambit of the expression 'just and equitable'. The same consideration goes for the fact of undue hardship to workers because practically all business enterprises must employ workers, whether many or few, who will in any event suffer undue hardship as the result of the winding-up. In *In re Yenidje Tobacco Company Limited* [1916] Ch. D 426, the company was wound up in spite of it continued to transact business and large profits were made. And in *In re Westbourne Galleries, supra*, the company though made good profits all of which were distributed as directors' remunerations nevertheless was wound up.

As the learned judge had erred in law in the exercise of his discretion we are entitled to review and interfere with his decision.

There are two points which the learned judge did not direct his mind though raised by both counsels in their submissions. The first point is whether there had been a break in the business of the SVK Patchee Brothers? The second point is whether the appellant had acquiesced to the decisions of the company relating to the complaints he raised? On the former, the appellant contended that there is no break in the business of SVK Patchee Brothers whilst the company asserted that there was a break in the business at the time of the incorporation of the company because at the meeting of 16 September 1967 it was agreed that the estates of SVS Manium and Abdul Rahman ceased to have any interest or any share in the company. With regard to the latter, the company claimed that prior to his retirement the appellant was involved in the management of the company and he was present at the meetings and consented to the impugned resolutions/decisions made thereat. On the first point we are of the view that there is no break of the business. Although there were subsequent partnership agreements and dissolution of the partnership essentially the business was continued, otherwise it would have ended upon the death of Manium if not for the will. This is manifest from the fact that (i) the company is still using the name of the business in 1947. (ii) from the documents tendered the company has its roots from 1937 (iii) the shareholders and the directors of the company since incorporation are the direct descendants of Manium and (iv) SD2, when cross-examined, admitted that the business was not sold but continued until this day (see Rekod Rayuan at 160 para. B). On the second point, although the claim may hold water we do really appreciate

the situation that the appellant was placed in and his predicament, that is to say, after the death of his father he was raised by the late father of SD2 to whom he owed respect and obedience according to tradition, and he has always been the voice of dissent which was extinguished, covered up by the majority and out voted. Be that as it may, it is our view that the fact of acquiescence cannot override the fact that presently there is a breakdown of mutual confidence and good faith among the parties.

At the end of the judgment the learned judge concluded:

> At the hearing there was no submission on alternative orders and my attention was not invited to the alternative prayer in the petition, otherwise would in addition to making an order disallowing a winding-up of the Company, order the reinstatement of the petitioner as a permanent director and increase his shares together with his brothers to 35% shares of the Company.

We wish to point out that there are no provisions in the Act which requires the court to consider the availability of alternative remedies and it was not obligatory for the court to consider the availability of alternative remedies before making a winding-up order under s. 218(1)(i) of the Act (see the Supreme Court case of *Tien Ik Enterprises Sdn. Bhd. & Ors. v. Woodsville Sdn. Bhd.* [1995] 1 MLJ 769). That may be the reason as to why the learned counsel for the appellant did not submit on or did not invite the learned judge's attention to that point.

Therefore, we allow the appeal and the following orders are hereby made:

(1) The company be wound up and that an approved liquidator nominated by the appellant be appointed liquidator of the company.

(2) The proceeds of sale of the assets of the company be held by the liquidator and the net proceeds be paid out to the shareholders of the company in the proportion of 65% to the descendants of Sayana Mohamed Ismail in accordance with their respective shareholdings and 35% to the descendants of Sayana Abdul Rahman according to their respective shareholdings in the company.

(3) Costs here and below to the appellant to be taxed.

(4) Deposit to be refunded.

My learned brothers Mokhtar Sidin JCA and Faiza Tamby Chik J have read this judgment in draft and have expressed their agreement with it.